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No. 43.
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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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THE WASHINGTON GAS LIGHT COMPANY ET AL.,
PLAINTIFFS IN ERROR,

vs.

THOMAS G. LANSDEN, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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This is a civil action for libel brought by the defendant in error, plaintiff below, against The Washington Gas Light Company; John R. McLean, its president; Charles B. Bailey, its secretary; William B. Orme, its assistant secretary, and John Leetch, its general superintendent, defendants below. The verdict of the jury was "guilty," as to the defendants The Washington Gas Light Company, Charles B. Bailey and John Leetch, which last-named defendants are the present plaintiffs in error.

The libel complained of consisted of a publication in the *Progressive Age*, a periodical printed in the city of New York, and widely circulated throughout the country among gas producers and manufacturers, charging, in effect, that the plaintiff had committed perjury, in that, in 1893, while he was an employé of the Washington Gas Light Com-

pany, he had given certain answers, under a resolution of Congress, to the effect that its gas cost 48.38 cents per thousand in the holder, and 40.09 cents per thousand feet for distribution; and that in 1894, having lost his position with the defendant company, and because of that fact, he had testified that its gas could be put into the holder for about 32 cents per thousand, and distributed for between 20 and 22 cents per thousand, which libel the plaintiff alleged was composed and published, or caused to be procured and published, by the defendants.

STATEMENT OF FACTS.

The plaintiff was a gas engineer of thirty years experience in the construction of gas works and the manufacture of gas, who had occupied the position of superintendent of the defendant company from November, 1886, to June, 1893, at a salary of $5,000 per annum, having occupied a similar position in St. Louis at the same salary for some eleven years prior to November, 1886.

In the spring of 1893, the defendant John R. McLean, president of the defendant company, informed the plaintiff that the Sundry Civil Appropiation bill, as passed by the House of Representatives, had reduced the price to be paid by the Government for gas to 75 cents per thousand feet; that the matter would probably be the subject of investigation before the Senate Committee; that he desired the plaintiff to come before that committee as a witness on behalf of the defendant company, and that he wished the plaintiff to write out something from which he, McLean, could prepare some questions to give to a committeeman upon which to question the plaintiff. Record, pp. 24, 30.

The plaintiff testified that thereupon he prepared a memorandum in the form of questions and answers, set out at pages

26, 28 of the Record, except that, as originally submitted to Mr. McLean, the said memorandum contained nothing as to the cost of gas; that said McLean said to plaintiff, "You say nothing here about the cost of gas," and was told by the plaintiff that the cost of gas must come from himself, or from the secretary; that he was thereupon furnished with a statement, putting the cost of gas in the holder at 48.38 cents per thousand, and the cost of distribution at 40.09 cents per thousand; that plaintiff said to McLean at the time, "It can not be possible that your gas costs that much?" to which McLean replied that they were entitled to charge interest on their investment, and that the plaintiff then wrote in those figures, stating, at the time, "It does not make any difference to me. If the committee asks me, I will give them to them as your figures." The plaintiff further testified that the items of cost could only come from the books, which were kept at the office of the secretary of the company; that the plaintiff could approximate the cost of gas in the holder, from knowing the amount of coal that was used, and the cost of labor, but that there were many items entering into its manufacture which were not purchased by the plaintiff, and the cost of which was not furnished to him; that he never knew the actual cost of the manufacture of gas, and could not know it unless he had access to the books of the company; that he never saw the books, either during his employment with the defendant company, nor afterwards; and that it would have been impossible for him, estimating merely as an expert, and without the books of the company, to have figured the cost down to the hundredth part of a cent, as was done in the figures inserted in the memorandum. Record, pp. 24–5, 28–9, 30–1, 33, 62–3.

The plaintiff was not called as a witness on behalf of the defendant company in 1893, and gave no testimony that year. The memorandum in question, he testified, was furnished for the private use of the defendant McLean, and was

left with said defendant. In April of that year, the defendent Leetch was employed by the defendant company, and in the following June the plaintiff, at the suggestion of its president, tendered his resignation, and was succeeded by the said Leetch, the latter, however, being given a more extensive employment than the plaintiff, and being designated as "general manager." Record, pp. 24, 28, 33, 29, 50.

In February, 1894, inquiry was made by the Senate Committee into the cost of the manufacture of gas, and the plaintiff, by invitation, appeared before that committee and testified that, in his opinion as an expert, gas could be put into the holder at from 30 to 32 cents per thousand feet, and could be distributed at from 20 to 22 cents per thousand. Record, pp. 25, 30.

The defendant, McLean, it is true, testified that the figures in the memorandum of 1893 were not given by him to the plaintiff, or "that he does not believe he got this information for Mr. Lansden;" but he admits that the salaries of the clerical force entered into the cost, which salaries were not paid by the plaintiff, who had no means of knowing what they were. The memorandum in question he further testified he gave to the secretary or assistant secretary, stating it to be a valuable thing, which ought to be put away and kept for reference. Record, 36, 38, 39.

Mr. Bailey, the secretary of the company, testified that the plaintiff called on him for some figures in relation to the distribution of gas; that he does not remember what he furnished plaintiff, but that he furnished him what he asked for; that he gave him no percentage of the cost of gas, but simply footings, which Lansden took away, and derived his own results from them; that these footings included all salaries and office expenses, and everything outside of the manufacture of gas, being the expenses incurred after the gas was put into the holder; and that the accounts kept at the office of the superintendent show the quantities of coal, oil, lime,

and other materials used in the manufacture of gas, in which accounts the price is carried out in cents and fractions of a cent; but said witness, at p. 43 of the Record, corrected this statement, and admitted that the accounts and monthly reports at the office of the superintendent did not show any prices or statement of costs, but simply the amount of material used during the month; and that these reports did not show taxes, which were something over $40,000 per annum, or insurance, or the cost of street lamps, which were over $20,000 per annum, nor the expenses of extending gas mains and gas pipes, which would be between $20,000 and $30,000 per annum, none of which items were within the plaintiff's knowledge, but came from the books of the defendant company, and that it was purely a matter of bookkeeping to ascertain from the books what the cost of the manufacture of gas was. Record pp. 40 et seq.

The testimony in the case further showed the following correspondence between E. C. Brown, editor of the *Progressive Age*, and the defendant John Leetch, general manager of the defendant company:

"E. C. Brown, publisher. Established 1883.
"Office of Progressive Age. Gas, Electricity, Water.
"NEW YORK, *February* 12, 1894.

"Washington Gas Light Co., Washington, D. C.

"GENTLEMEN: I have watched with great interest the continued reports of the proceedings against your company as published in the local newspapers of your city, and I have been somewhat surprised at the character and extent of Mr. Lansden's testimony. Was his statements correctly reported in the Washington Star of 3rd inst.? Newspapers all over the country are taking up his figures and using them to suit their own ends against home companies. Any information you would care to give us concerning the object of Mr. Lansden's attack will be considered confidential as to source of information.

"Very truly yours, E. C. BROWN."

"WASHINGTON, D. C., *Feb.* 13, 1894.

"E. C. BROWN, Esq., Publisher Progressive Age, 280 Broadway, N. Y.

"DEAR SIR: I have just now received yours of the 12th instant, relative to the statement made by Mr. T. G. Lansden, former supt. of the Washington Gas Light Company, before the investigating committee of Congress to reduce the price of gas in this city.

"As Mr. Lansden is no longer in the employ of the gas company, the motive was generally understood that prompted his statement.

"As the newspapers in Washington gave a correct version of his statement, there is no doubt he said that gas could be furnished at the meter for 70 cents and to the consumer for $1.00 per 1,000 cubic feet. This price at the meter was exclusive of repairs, services, etc.

"Under a former resolution of Congress, bearing date of February, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of price of gas in Washington, and made the following replies:

"'Q. What does gas cost to manufacture at your works?

"'A. It costs us 48.38c. per thousand in the holder and 40.09c. per thousand for distribution.

"'Q. Can you in any way reduce the cost of gas in the manufacturing so your company could sell for less to the consumer?

"'A. I know of but one way that a small amount could be saved—that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

"'Q. How do the prices charged for lamps in Washington compare with other cities?

"'A. They are as low as anywhere the same amount of gas is burned to the lamp and the same number of hours lighted in the year, and when the company lights and cleans the lamps.'

"You will notice that he makes a difference of about 18½ cents per 1,000 feet then as compared with

his statement now, although he must know that the material used—coal and labor—is just the same now as then, except price of naptha, which is higher. You can try to reconcile the two statements.

"Very truly yours,

"JOHN LEETCH,

"*General Manager.*"

"E. C. Brown, Publisher. Established 1883.

"Office of Progressive Age. Gas, Electricity, Water.

"New York, February 14, 1894.

"John Leetch, *General Manager.*

" *Washington Gas Light Company,*

" *Washington, D. C.*

"MY DEAR SIR: I thank you for your prompt reply to my letter of the 12th inst. Your statements, as contained therein, are exceedingly interesting, I can assure you. It would seem that the inference as to the occasion for the statement could only result from one cause.

"I would ask you, if you can do so, without too much trouble to yourself, to give me, categorically, the questions propounded to Mr. Lansden and answered by him as reported in 'The Star' of the 3d inst. I should like to reproduce exactly the questions and his replies under the former resolution of Congress, February, 1893, and follow up with the same covering the present investigation.

"I will not ask you to hurry about this, for I can not use the matter until our issue of the 1st of March; but then, I can assure you, I will take it up in the proper way. Any other facts of interest that you can give me in this connection, I shall appreciate.

"Mr. Lansden is a gentleman whom I have met on only one or two occasions, and I scarcely know the man; but I should have thought that he or any one possessing ordinary judgment would not have placed himself in the awkward situation that he seems to have done, judging from the two records he

has made during investigations. I know that the gas industry, as a whole, will not feel very kindly toward Mr. Lansden, from the fact that his statements, made at the recent investigation, as to the cost of manufacturing and distributing gas are being republished in scores of papers throughout the country, and many gas companies far removed from Washington will have to battle against the recent statements of Mr. Lansden.

"Very truly, yours,

"E. C. BROWN.

"Will the testimony be printed? If so, I should like to secure a copy of the same."

"E. C. Brown, Publisher. Established 1883.

"Office of Progressive Age. Gas, Electricity, Water.

NEW YORK, *February* 19, 1894.

"Mr. John Leetch, Gen'l Manager Washington Gas Light Co., Washington, D. C.

"DEAR SIR: I trust our letter of the 14th inst. in reply to yours of the 13th was duly received. I hope you are intending to give me questions propounded to and answered by Mr. Lansden during the present investigation similar to the manner in which you gave me the questions then answered by him under the former resolution, as appears in your letter of the 13th. I am wanting to treat this matter in the way it should be touched on, and I have in mind publishing Mr. Lansden's testimony on this particular point side by side.

"Among all the gasmen whom I have talked with about his peculiar position, not one says a good word for him, as might naturally be expected.

"Please let me hear from you as early as convenient, and oblige,

"Yours truly,

"E. C. BROWN."

"WASHINGTON, *Feb.* 20, 1894.

"E. C. Brown, Esq., publisher Progressive Age, 280 Broadway, N. Y.

"DEAE SIR: I am in receipt of yours of the 14th and 19th instant. This delay in reply was my inabilty to secure a copy of report of proceedings before investigating committee of Congress. Only about twenty copies have thus far been printed for use of committee.

"Today I received a copy, which I herewith inclose for your use.

Respectfully, JOHN LEETCH,
General Manager.

See, also, for further correspondence, pp. 52, 53 of the Record.

The testimony of the defendants Bailey and Leetch further shows that, upon receipt of the Brown letter of February 12, 1894, said Leetch exhibited the same to the defendant Bailey, and that he, Bailey, said to Leetch,—

> "I have a paper in Mr. Lansden's own handwriting where he stated that the price of gas was so and so, and the price of distribution was so and so;"

that he made this statement to Leetch in connection with the said Brown letter of February 12, 1894, and gave him the paper in question; and that when he handed Leetch the said answers of 1893, written by Mr. Lansden, he knew that the items of those answers, at least in so far as they related to the cost of distribution, did not rest upon Mr. Lansden's own personal knowledge, but came from the books of the company; and that the defendant Leetch thereupon took the said answers and wrote the letter to Brown of February 13, 1894. Record, 42, 44.

It was attempted on the part of the defendant to establish by the testimony of the defendant Leetch that his letter of

February 13th, upon which the article in the *Progressive Age* was based, was a mere personal letter, intended as a courtesy merely to the editor of *The Age*; and that it was not written by him in the performance of his duties as general manager of the defendant company. The defendant Bailey, also attempted to cast some doubt upon the question whether it was within the province of the general manager to write that letter in reply to Brown's communication of the 12th February. Record, p. 44–5.

As to the testimony of the defendant Leetch upon this point, however, the evidence disclosed the fact that he was without any personal acquaintance with Brown (Record, pp. 51, 54); that the inquiry of the latter was addressed, not to Leetch personally, but to the "Washington Gas Light Co., Washington, D. C. Gentlemen:" (Record, p. 10); that there was nothing in that letter of inquiry which the defendant Leetch himself could point out as indicating that it was a personal letter to himself (pp. 54, 55); that, after he answered it, the letter was placed among the other papers of the company in the secretary's office (p. 55); that his letter of February 13th, and all the other letters written by him to Brown, were copied by him into the letter-book of the company, kept in the secretary's office, "in which he has the privilege of making copies for the general office work"—all the letters in which book were written either by the secretary, the assistant secretary, or the general manager, and all which letters were signed by said officers officially. Record, pp. 62, 64. The testimony of Mr. Leetch was further weakened by his positive statement that he "did not know, and had no reason to know, until it came out, that Mr. Brown was getting up this data to publish in his article," (p. 56), until forced to abandon that position upon being confronted with Brown's letters of February 14th and 19th (pp. 49, 50), asking an extra copy of the questions and answers propounded to and answered by Mr. Lansden during the present investigation, similar to the manner in which

you gave me the questions then answered by him under the former resolution, as appears in your letter of the 13th, stating that the writer proposed publishing the plaintiff's alleged "testimony on this particular point side by side," and Leetch's own letter of February 20 in reply (p. 50), enclosing one of the only twenty copies of the testimony of 1894 at that time published, "for your use."

The testimony of Mr. Bailey, upon the point whether it was within the scope of the duties of the general manager to reply to the letters of Brown, is equally infirm. He admits, on pages 42–3, that Leetch was general manager of the company, and that he "took the place of what used to be the engineer;" that every letter is not written from the secretary's office; that—

> "all letters relating to the engineer's department, pretty much, are written by the engineer or superintendent,"—

and that this matter as to the cost of gas was regarded as a matter belonging to the engineer's department; although, on the same pages, the witness adds he did not think Leetch was the proper officer to give the information Brown wanted, and that *most* of the letters relating to the cost of the production of gas would properly come to the secretary's office.

As will be seen from the instructions given by the court, the question was left to the jury to determine, upon this evidence, whether Leetch's letter of February 13th was written and forwarded by him in the course of his duties as general manager of the defendant company, for the purpose of supplying the data which it contains for a publication in the *Progressive Age*; as, also, whether the defendant Bailey, secretary of said company, called the attention of said Leetch to the so-called Lansden answers of 1893, and gave them to him, for the purpose of enabling him to communicate them to Brown as Lansden's own statements, knowing them to have been furnished Lansden from the books of the company, and that they were not figures produced or arrived

at by him personally. The jury, with the witnesses before them, and the consequent opportunity to observe their appearance, their bearing and their manner of testifying, determined these questions affirmatively; and the trial court, with the like opportunity for observing and hearing the witnesses, was satisfied with the verdict, and refused to disturb it.

The statement of the case set forth in the brief on behalf of the appellants contains some inaccuracies in point of fact, which it may lessen the labor of the court to point out specifically here:

1. At p. 12 of the brief, it is stated that the plaintiff claimed, "without any evidence," that Bailey knew the figures in the statement of 1893 not to be the estimate of the plaintiff. At pp. 41–2, 43 of the Record, Mr. Bailey, himself, testified that, as to the cost of manufacture, it would have been "an endless task" to make up the figures from any data possessed by the appellee, and at pp. 44 that *he knew*, when he gave the statement to Leetch,

> "that the items in the answers, *at least* in so far as they regarded the cost of distribution, did not rest upon Mr. Lansden's personal knowledge; that they came from the books,"

and that he, Bailey had, himself, given many of the items to the appellee.

2. The brief, at p. 14, states the uncontradicted evidence to be that Leetch, when he wrote his letter, believed that the statement of 1893 contained the appellee's estimate of the cost of the manufacture and distribution of gas, referring to p. 53 of the Record in support of this statement. The fact is, the appellants offered no evidence whatsoever tending to prove that Leetch did not know, as well as Bailey, that the figures contained in that statement were figures for which Lansden was in no wise responsible.

3. The brief, at p. 15, states that the appellee admitted he could closely approximate the cost of manufacture, but

utterly failed to explain the wide difference in respect of manufacture between the statement and his evidence in 1894, etc. On the contrary, the uncontradicted evidence is that, when the figures were given him, the appellee said, "It can't be possible that your gas costs that much;" that Mr. McLean claimed that they were entitled to "charge interest on the investment," and that the appellee thereupon said,

> "It don't make any difference to me. If the committee ask me, I will give them to them as your figures."
>
> Record, pp. 25, 33, 83–84.

4. It is claimed, at p. 16 of the brief, that there is no evidence that Brown's letter of February 12, 1894, was ever received by the company, or *express* authority given to Leetch or anybody else to answer it. The general manager and the secretary both testify that the letter came to their hands and was read by them; the secretary thereupon gave the general manager the statement of 1893, and the latter forwarded it to Brown, with an accompanying letter, signed by him as "General Manager," and copied into the regular letter-press book of the company, into which its official correspondence was copied. The president, the assistant secretary, the general manager, and all the directors except one who was ill and another who was nonresident, appeared as witnesses in the case, no one of whom attempted to deny the general manager's authority to do all that he did.

THE ASSIGNMENTS OF ERROR.

The appellants' eleven assignments of error present the following propositions of law:

I. That the defendants are not liable for the libel as published, because the article containing it is not, in its entirety,

the composition of the defendants, or any of them. This proposition embraces the first, fourth and eleventh assignments of error, and rests upon the rejection by the court of the appellants' prayers for instructions numbered "1," "8," and "20," at pp 66, 67 and 79 of the Record.

II. That the court erred in instructing the jury, in effect, that if the information furnished by the appellants to the editor and publisher of the *Age* was so furnished by them with the knowledge that it was likely to be, or probably would be, used as the data for a publication in said *Age*, and that it was furnished by them maliciously for such purpose or with such knowledge, the appellants were legally responsible for the publication to the extent that its contents were suggested by the data so supplied. This proposition embraces the second, fifth and seventh assignments of error, and rests upon the granting by the court of the plaintiff's first and second prayers for instructions (Record, pp. 64–65), and the modified form in which the appellants' prayer for instructions numbered "7" (p. 67) was granted.

III. That the court erred in leaving it to the jury to determine whether the appellant Bailey, at the time when he gave Leetch the so-called Lansden answers of 1893, knew that the statement as to the cost of the manufacture and distribution of gas contained therein were estimates furnished the plaintiff from the books of the company for the purpose of being inserted in said paper, and were not figures produced or arrived at personally by him. This objection is presented in the third and sixth assignments of error, and rests upon the granting by the court of the plaintiff's second prayer for instructions. Record, p. 65.

IV. That the court erred in admitting evidence as to the financial condition of the appellant, the Washington Gas Light Company. This objection embraces the eighth assignment of error, and rests upon the exception to the admission of that evidence, set forth at pp. 34–5 of the Record.

V. That the court erred in refusing to instruct the jury

that the Leetch letter of February 13 was a privileged communication, and that, in consequence of such privileged character, there could be no verdict against any of the defendants in whom no express malice was shown to exist. This is the ninth assignment of error, and rests wholly upon the rejection of the appellant's prayer for instructions numbered "13," at p. 69 of the Record.

VI. That the court erred in instructing the jury that, if Leetch was the general manager of the Washington Gas Light Company, and if he wrote and sent the letter of February 13 in the course of his duties as such general manager, and for and on behalf of said company, the company was bound by his act, though not expressly authorized or subsequently ratified by its board of directors. This objection is presented in the ninth assignment of error, and rests upon the granting of the plaintiff's first, and the rejection and modification of the appellants' second, tenth, eleventh and sixteenth prayers for instruction. Record, pp. 64–70.

VII. That the court erred in entering judgment upon the verdict, which finds the appellants, the Washington Gas Light Company, Bailey and Leetch guilty, and is silent as to the defendants McLean and Orme. This objection is the twelfth assignment of error, and rests upon no objection or exception taken at the time, or contained in the Record.

It will, perhaps, conduce to clearness if these several questions are considered separately, instead of being blended, several of them, together, as in appellants' brief.

I.

The first question for consideration, then, is: Are the appellants, if otherwise guilty, to escape liability for their wrong because the data furnished by them, though for that purpose, was written up by the editor in his language, and theirs, and accompanied by comments of his own?

This question is treated of in the appellants' brief, and

the supplement thereto, in connection with the doctrine of of variance; and the authorities cited in support of the objection are, without exception, cases recognizing and applying the well-established principle of pleading that, where the libel offered in evidence differs, even in slight verbal particulars, from the libel set out in the declaration, the difference is one of *description*, and will constitute a fatal variance.

Where there is such a variance—

> "objection should be made to reading the article on that ground, and, if overruled, an exception taken. If this is not done, the objection can not be raised in the Appellate Court."
>
> Clay *vs.* People, 86 Ill. 147.

As will be seen from the Record (pp. 12, 14, 17), the Leetch letter of February 13 was first offered and read, after which the article as written by Brown and published in *The Age* was offered and read in evidence, without objection of any kind. Nor was the objection of "variance" made at any later stage of the trial, that ground of objection being interposed in the Appellate Court for the first time The only exceptions in the record to which the first assignment of error can relate, is to the court's refusal to charge the jury as requested in the defendant's prayers numbered "8" and "20," that, if the defendants did not cause or procure to be published the entire article complained of, or if that article differs materially from Leetch's letter of February 13th, then the defendants would not be liable for any part of it, and the verdict should be in their favor.

The defendant's prayer No. 20 was properly rejected upon another ground, viz.: It required the court to withdraw wholly from the consideration of the jury the Leetch letter of February 20th, in reply to Brown's letters of February 14th and February 19th, inclosing the desired copy of Lansden's answers before the Senate Committee in 1894, forwarded for the express purpose or "use" of enabling Brown to

publish "Mr. Lansden's testimony on this particular point side by side." The instruction in question required the jury to find for the defendants, if the published article differed materially from the letter of February 13th, although such difference may have largely consisted in the publication, side by side with the answers supplied by the letter of February 13th, of the answers given the committee in 1894, which were forwarded by Leetch on February 20th, for the express purpose of being so published in contrast.

The defendants' eighth exception, therefore, is the only one available for their first assignment of error; and that exception raises the question, only, whether a defendant who has participated in the concoction and publication of a libel, is exonerated from liability if his associate in the wrong includes other matter, whether libellous or not, in the same publication—a question we are willing to submit without argument

The objection is a purely technical one, and the technical answer to it, if it stood alone, would seem to be complete.

As pointed out above, however, the legal proposition involved relates only to identity of description in pleading. It does not require that, where the article declared on *is* identical with the article offered in evidence, and thus satisfies the rule, the party charged with causing or procuring its publication shall, nevertheless, escape responsibility, if the libel, though substantially his, is not wholly in his phraseology, or contains comments and additions by the party whom he has caused or procured to publish it.

The rule, and the reason of it, are clearly laid down as far back as Queen *vs.* Drake, 3 Salk. 224. In that case, the information, which was for libel, differed from the libel offered in evidence in the single word *nec* instead of *non*, and the variance was held fatal upon the following grounds:

> "There can be no *tenor* of words spoken, because there is no written original; but there may be a *tenor* of a writing, which word always imports a true copy

> of the thing written, and consists in identity. A libel may be described either by the sense or by the words, and, therefore, an information charging that the defendant made a writing containing such words is good, and in such case a nice exactness is not required, because it is only a description of the sense and substance of the libel. But an information, charging the defendant with making a writing *secundem tenorem sequentem*, then the written libel and that set forth in the information must exactly agree, because every word in the information is a mark of description of the very libel itself; so in trespass, *quare clausum fregit*, etc., if the plaintiff sets forth the buttalls and boundaries of his close, and fails in the proof thereof, he can not recover, *because he is obliged to prove his description, and there is no difference between wrongs done by words and by things.*"

So in Commonwealth *vs.* Hannen, 2 Gray, at page 291:

> "When the publication of a written or printed instrument statement or representation is made the basis of civil or criminal proceedings against its author or publisher, it ought to be set out in the complaint or declaration, not only with substantial, but with literal accuracy and precision. Commonwealth *vs.* Wright, 1 Cush. 63. . . . In such a description of the allleged defamatory matter, every part operates by way of description of the whole, and the libel proved can not be the same with that which is the subject of the prosecution, when they vary as to any part, however unimportant. 3 Stark. Ev., 4th Amer. Ed. 1546."

And, upon the resulting distinction between differences in allegation, and variances in description, see Gates *vs.* Bowker, 18 Vt. 23; Commonwealth *vs.* Varney, 10 Cush. 403, 404; State *vs.* Perrin, 3 Brev. 152.

The rule in question is not peculiar to actions for libel, nor for torts. If a declaration upon a contract describe it as bearing a certain date, or as being for a certain amount, there will be a fatal variance if the contract offered in evidence bears a different date, or is for a different sum; but,

if the requirement as to the accuracy or identity of description is complied with, recovery will not be defeated because it may appear that the instrument was not executed on the day it purports to have been, or that the full consideration it recites, and which is declared upon, did not in fact exist, or the like. These are matters of substantive allegation, which may be varied in proof, affecting, though not defeating, the recovery; while, in matters of *description*, variance is fatal.

Returning to the feature in controversy in the case at bar, it will readily be seen that there is here no case of variance or discrepancy between the libel declared upon and that offered in proof. There is no claim in the record that the publication in the *Progressive Age* offered in evidence differs in any respect from the libel set forth in the declaration. The appellants' objection is evidently based upon the misconception that the letter of February 13th is the libel sued for; whereas the action is upon the article published in *The Age*, and the letter of February 13th is simply one link in the chain of evidence, or one of the facts and circumstances submitted to the jury, from which to determine the truth of the allegation that the defendants caused or procured its publication.

Viewed in this, its correct light, the appellants' objection is simply this: We are charged in the declaration with having caused or procured the publication of the entire article. We, in fact, caused or procured the publication of only a part of it, to wit, that part which, under the *innuendo*, comprises the entire libel complained of; therefore, we are liable for no part of it.

In Coghill *vs.* Chandler, 33 Mo. 115, the words laid in the declaration were—

> "I believe John Coghill shot my dog, and he shot him for the purpose of stealing, and he is the fellow who stole my molasses."

The answer denied having spoken the words contained in the declaration, and this was "the only issue made by the pleadings." The proof showed only the words, "He is the

fellow who stole my molasses." The court's refusal to instruct the jury that the words charged were not supported by the evidence, and that they should find for the defendant, was sustained, the appellate court saying:

> "The rule is that the words proved must substantially correspond with those alleged in the declaration. It is not necessary to prove all the words laid, unless they constitute one entire charge. . . . The absence of proof to show that he also uttered the other words imputed to him does not, under the rule laid down, constitute a material variance—the words *he is the fellow that stole my molasses* embracing within themselves, and independent of what preceded them, an allegation of larceny."

So, in the present case, every part of the publication charged by the plaintiff under the *innuendo* as constituting the libel, is clearly found by the verdict to have been communicated by the appellees to Brown in aid of his express purpose to publish his testimony upon this particular point "side by side."

In Lewis *vs.* McDaniel, 82 Mo. 577, a similar rule was declared, and an instruction to the jury that, if they found any of the words stated in the declaration to have been proven to constitute substantially the charge imputed to plaintiff, they should find for the plaintiff, was sustained.

See, also, Casey *vs.* Hubechon, 25 Mo. App. 91.
Purple *vs.* Horton, 13 Wend. 9, 24.
Barr *vs.* Gaines, 3 Dana, 258 and citations.
Dufresne *vs.* Weise, 46 Wis. 290.
Scott *vs.* McKinnish, 15 Ala. 662, 665 and citations.
Miller *vs.* Miller, 8 Johns, 74.
Purcell *vs.* Archer, 7 Tenn. 317.
McClintoch *vs.* Crick, 4 Iowa, p. 459 and citations.
Compagnon *vs.* Martin, 2 Wm. Bl. 790.
Baker *vs.* Young, 47 Ill. 42, 46.
Loomis *vs.* Snick, 3 Wend. 205.
Nestle *vs.* Van Slyck, 2 Hill, 282.

These, it is true, are actions for slander; but in the particular here being considered—namely, the effect of proving some, but not all, of the tortious conduct alleged, where that which is proved is of itself sufficient to constitute a cause of action—there is no difference in the rule of law applicable. There is in this respect, as the court say in Queen *vs.* Drake, *supra*, "no difference between wrongs done by words and by things."

It will be observed that none of the authorities cited in support of this first assignment of error are pertinent to the question here presented. In all of them, there was variance between the libel as set forth in the declaration and that offered in evidence. Authorities are not wanting, however, either here or in England, upon the question presented in this case; and upon it, it is believed, they are entirely harmonious.

In Strader *vs.* Stryder, 67 Ill. 405, the defendants had sent to the publisher of a newspaper for publication a written communication, signed by them, reflecting upon the character of the plaintiff. Changes were made in the phraseology of the article in publishing it, though none which altered the sense in respect to the alleged libellous words, and the declaration was upon the article as published. The defendants asked the court to instruct the jury that, unless the words and phraseology of the manuscript were identically the same as in the newspaper article, there could be no recovery: *held*, rightfully refused. The court said:

> "The action was brought for the words published in the newspaper—not those in the manuscript. The materiality of the latter as evidence was only upon the question of the agency of the defendants in the procurement of the former; in short, it was for the purpose of showing that the newspaper article was published in consequence of the production by the defendants of the manuscript for the purpose of being published. In this view, mere verbal alteration, not affecting the sense, would not exonerate. To have that effect, the alterations must be material."

And the court cites Adams *vs.* Kelly, 20 E. C. L. 403, to the effect that, where a reporter gave a written statement to the editor of a newspaper, the contents of which had been communicated to him by the defendant for the purposes of publication, what the reporter published in consequence of what passed with the defendant, though with some alterations not affecting the sense, might be considered as published by the defendant.

In Miller *vs.* Butler and Jencks, 6 Cush. 71, the libel was written by Jencks, in the presence of Butler. The proofs were to the effect that one of them proposed to the other the writing of it, and that Butler encouraged the writing of it and suggested some of the expressions. The libel was a letter which two days later was found in the post office, addressed to one Bartlett, by whom it was received in course of mail. It was objected that there was not sufficient evidence against the defendant Butler. The court said:

> "The evidence of publication was quite sufficient to authorize the jury to find that fact as against both defendants. The letter to Bartlett was written by Jencks, Butler assisting in composing it, and written in pursuance of a previous proposal made by one to the other. It was then sent by mail to Bartlett. Both parties to the transaction were engaged in a common object, and the acts of one are to be taken as having been done by both, as to the legal effect attached to them." 2 Greenl. Ev., Sec. 416.

The analogy between this case and the case at bar would seem to be perfect. Brown first writes the defendant company for data, promising that the data furnished will be treated as confidential "as to source of information," and the company, through its secretary and general manager, thereupon, in response, sends him the alleged Lansden answers of 1893, with a statement couched in such language as fairly to convey the impression that they were testimony given by him under a former resolution of Congress. Brown

then writes to the general manager of the company for an exact copy of the plaintiff's testimony in 1894, stating, as his reason for desiring it, his contemplated purpose of printing the plaintiff's supposed contradictory "testimony upon this particular point side by side;" whereupon the general manager procures one of the only twenty copies published for the use of the committee, and forwards it to Brown, "for your use," and the publication of the libel follows. Here was the previous proposal of the one to the other, the invited assistance given in aid of that proposal, the participation of both in the common object, and the consequent evolution and publication of the libel complained of, embodying, precisely and fully, the data contributed for the purpose of the proposed publication.

In Howe Machine Co. *vs.* Souder, 58 Ga. 64, an advertisement, reflecting upon the plaintiff, was published in a newspaper. Later, it was changed by one proven to be the agent of the corporation, who at the same time promised to pay for it: *Held*, that a corporation might publish a libel; that the act of its agent in controlling and promising to pay for the libel authorized the jury to infer that it was authorized by the corporation, and that the judgment against the corporation should be affirmed. There was no pretense that the board of directors authorized the libel, or that authority to publish such an advertisement had been by it conferred upon the agent.

In Clay *vs.* People, 86 Ill. 147, the defendant voluntarily made a statement of facts to a reporter of a newspaper, who partly wrote up an article based upon them, and then communicated them to the editor, who completed the article, with sarcastic comments of his own. The article was read from the proof-sheets to the defendant, who said it was a little rough, but it was true, and let it go. The defendant did not write any part of the article, or request its publication: *Held*, he could not defend on the ground that he did not write and publish the article himself.

In Reg. *vs.* Cooper, 55 E. C. L. 533, the defendant was indicted "for publishing and causing and procuring to be published," a libel in a newspaper. The editor testified that the defendant expressed a wish that he would "show up" the party libeled, and told the editor the story which formed the basis of the article, and, before the publication, remarked to the editor that it had not yet appeared. The article embodied the story substantially as told by the defendant, with comments of the editor exhibiting the plaintiff in a ludicrous light. After its appearance, the defendant told the editor he had seen it, and liked it very much. It was objected that the defendant only told the story, and that the comments, which gave a ridiculous character to the whole, were added by another, and that there was a variance produced by the publisher having added matter.

The facts of this case would seem to agree in every essential particular with the case at bar. In that case, it is true, the defendant asked the editor to publish, while, in this, the editor made the proposal and asked for the data. In that case, also, the defendant expressed his approval of the entire article, after its publication, while in this the general manager, being applied to by Brown, was at first silent, and, upon a second application by Brown, after suit was threatened, merely corrected the inaccuracy as to the alleged Lansden answers of 1893 having been given by him before a committee of Congress (see Record, pp. 53, 52), leaving Brown to adhere to the article in all other respects without dissent or objection by him. The inaccuracy thus tardily corrected, moreover, is one which Leetch's letter of February 13 fairly and naturally suggested, and which he did not correct in his reply to Brown's letters of February 14 and February 19 (Record, pp. 49–50), which last named letter disclosed the sense in which the latter understood Leetch's letter of February 13. These are the only differences in the facts of the two cases, and, it is submitted, they in no way vary the legal question involved.

In this case of Reg. *vs.* Cooper, the court said:

> "If a man requests another, generally, to write a libel, he must be answerable for any libel written in pursuance of his request; he contributes to a misdemeanor, and is therefore responsible as a principal. He takes his chance of what is published. . . . It is observed that there were additions, but the editor said that what the defendant communicated was substantially what was published. If we held this not to be a publication by the defendant, we must go to the length of exonerating a party who gives instructions for a libel in every case where the libel published departs from the instructions by a single word. It is enough that there is a substantial identity. . . . A variance is out of the question, in the situation in which this party has placed himself. That which did appear is what he instigated and approved of." Denman, C. J.
>
> "It would be very dangerous to allow a man to direct a libel to be published, on a particular subject, and, after he has approved of what is published, to defend himself on the ground that something has been added to his original communication." Wrightman, J.

To similar effect, see—

Parker *vs.* Prescott, L. R., 4 Ex. 169.

The legal principles contended for in the supplemental brief of the learned counsel for the appellants will not be combated here, but, it is submitted, they are without application to the case under consideration. It may well be true that A, who has libeled C, is not liable for the act of B, who copies that libel upon another piece of paper, if A was in nowise concerned in B's act; but if B applied to A for the libel, and A furnished it for the purpose of having B copy it, or write another libel based upon it, the liability is undoubted. In the very case of Cochran *vs.* Butterfield, 18 N. H. 115, referred to in the supplemental brief as "decisive," the defendant's freedom from liability was expressly

based upon the ground that he not only did not request a libel to be composed out of the materials that he supplied, but that he never—

> "expected, or had any cause of suspecting, that his communication would have been used for such a purpose."

It is stated, at page 20 of the appellant's brief, that "the letter of the 13th of February, 1894, was the sole predicate of liability." The inaccuracy of this statement, though of course inadvertent, is singular. The general manager Leetch, not only wrote the letter of February 13, enclosing the answers of 1893, stating in effect that the contradictory statements of 1894 were made because of Lansden's loss of employment with the company, and suggesting to the editor of *The Age* that he might "try to reconcile the two statements," but, in response to the latter's request for a verbatim copy of the answers of 1894, that he might publish the two "side by side," the general manager procured one of the few copies printed for the Senate Committee and forwarded it to Brown, "*for your use*"—*i. e.*, for the very purpose the latter had announced (Record, 49–50). A more conclusive "predicate of liability," it is submitted, could not exist.

II.

The second assignment of error is to the action of the court in submitting to the jury the question whether the publication was caused or procured by the defendants, upon all the facts of the case as disclosed by the evidence, instead of instructing them, as requested by the defendants' seventh prayer, that they were not liable unless they requested or solicited the publication, and if the article was published without their knowledge.

The allegation of the declaration in this respect is, not that the defendants requested or solicited the publication of the

article, but that they caused or procured it. It certainly can not be essential to legal liability for causing or procuring an act, that such causing or procuring should have been through the instrumentality of an express request or solicitation; nor do any of the authorities which the industry of counsel has collected give even color to such a proposition. In Cochran *vs.* Butterfield, 18 N. H. 115, one of the authorities cited, the decision is placed upon the ground that the defendant did not request the publication, and neither expected nor had reason to expect that the materials communicated by him would be used for the composition or publication of a libel. The case of Parkes *vs.* Prescott, L. R., 4 Ex. 169, is in no respect in conflict with the ruling of the learned justice who tried the case at bar, while the other authorities cited are wholly aside from the question in controversy.

The appellants' seventh prayer, was, moreover, necessarily rejected, because one of the questions of fact it proposed for submission to the jury, viz., whether the article was published without the defendants' knowledge, was without any evidence to support it. Mr. Leetch, it is true, at first testified that he did not know the article was to be published until he saw it in the magazine (Rec., p. 56); but, on being confronted with Brown's letters to him of February 14 and 19, asking a copy of Lansden's testimony before the committee in 1894, stating, in terms, thathe contemplated publishing the alleged testimony "side by side," and with his own letter of February 20th, in reply to these communications, forwarding the testimony of 1894 in compliance with the editor's request and for his "use," he receded from this statement, and admitted, as he was compelled to do, knowledge upon his part, when he wrote the letter of February 20, that Brown intended to publish the statement, and that he knew this because "Brown so stated in his letters." Record, p. 56.

That the libel was caused by the appellants, if that fact were required to be determined by this court, is demonstrated by the Record.

The editor's first letter (p. 10–11) discloses the fact that he was entirely without any information or data as to the matters which appear in the libel. He merely expresses surprise at the character and extent of the plaintiff's testimony before the committee in 1894, invites information as to the object of it, and promises, not that the information would be considered as confidential, but that it should be so considered "as to source of information," merely; thus declaring, in effect, that the information which should be supplied in compliance with his request would be published.

Thereupon the general manager, having exhibited this letter of inquiry to the secretary, and having been furnished by him with the socalled Lansden's answers of 1893, in connection with that letter (42), writes the letter of February 13 (Record, p. 12), stating in effect that Lansden made the alleged answers which are set forth in it "under a former resolution of Congress, bearing date of February, 1893," that his testimony in 1894 was given with the knowledge on his part that the cost of materials was as high, and one of them higher, in 1894; that the motive which prompted what the Brown letter designated as his "attack" was the fact that his employment by the company had been terminated, and that the editor, whose letter had indicated his purpose to publish the information given, could "try to reconcile the two statements."

In reply to this letter, the general manager receives the editor's letters of February 14th and February 19th, assuring him that his statements are "exceedingly interesting," stating that the plaintiff's testimony of 1894, seemingly, "could only result from one cause;" asking that he would furnish the editor, categorically, with the questions propounded to the plaintiff and answered by him in 1894, stating that the latter wished "to reproduce exactly the questions and his replies under the former resolution of Congress, February, 1893, and following with the same covering the present

investigation"; that he was not asked to hurry about this,

> "for I can not use the matter until our next issue of the 1st of March; but, then, I can assure you, I will take it up in the proper way";

that any other facts of interest the general manager could give him he should appreciate; that the editor knew the gas industry as a whole would not feel very kindly toward Mr. Lansden, and that he has it in mind to publish his testimony "on this particular point side by side;" the letter of February 14th, further referring to the two alleged statements as "the two records he has made during investigations," and thus disclosing the sense in which he understood the allegation of the Leetch letter of February 13th, as to the occasion upon which the plaintiff made the alleged answers of 1893.

Thereupon, with these letters before him, and without any attempt at correction of the false impression concerning the answers of 1893, which his former letter had naturally, if not intentionally, conveyed, Mr. Leetch, under his official signature as "general manager," writes the letter of February 20th, 1894, Rec., p. 50, forwarding the desired copy, obtained with difficulty, of the plaintiff's testimony in 1894, "for your use," and the publication follows on the agreed date, March 1, 1894, containing precisely the charges which were indicated in the Leetch letters and the accompanying data supplied—"written up," or expanded in form, and accompanied by sarcastic comments of the editor, as in the cases of Reg. *vs.* Cooper, and Clay *vs.* People, *supra*, and as was indicated in his letter to Leetch of February 14th, would be the case. The entire libel complained of, as fixed by the *innuendo*, and so far as the same is contained in the article, is based upon the data thus supplied the editor, under his express announcement, that he desired it for purposes of publication; nor is it claimed anywhere in the record that the editor had materials from any other source whatever from which the libel complained of itself, or any of the charges it contains, was in fact, or could have been, composed.

Under these circumstances, as stated above, if the question of fact, whether the defendants, or any of them, did cause or procure the composing and publication of the article were to be determined here, the record demonstrates the affirmative of that proposition. The only question here, however, is, whether that question should have been submitted to the jury, upon the facts and circumstances of the case, or whether the court should have instructed them that the defendants did not cause or procure, unless they affirmatively and expressly requested or solicited the composition and publication.

The criticisms upon the first instruction on behalf of the plaintiff, and the charge of the court to similar purport, it is submitted, are without merit. These criticisms are, principally, first, upon the submission to the jury of the question whether the letter of February 13 was written and sent for the purpose of supplying the data which it contained for *a*, as contradistinguished from *the*, publication in the *Progressive Age*; secondly, the submission of the alternative question whether it was written or sent with the knowledge that it was likely to be, or probably would be, used for such purpose; and, thirdly, the charge that, if the preceding hypotheses were found in favor of the plaintiff, the defendants referred to would be liable to the extent that the contents of the published article were suggested or inspired by that letter.

1. The first of these criticisms is to the effect that one who furnished the publisher of a newspaper with matter defamatory of another, for the purpose of having a publication made, based upon and embracing the matter so furnished, is not liable, unless he knew in advance just what *the* publication, in its entirety, would be, and furnished the date with that knowledge and to that end. That this ought not to be, and is not, the law, both the reason of the case and the authorities above cited, sufficiently demonstrate.

2. The second criticism, as applied to the facts of this case, is wholly without importance. Leetch testifies, in terms, that *he knew* Brown intended to publish the statement, because he so stated in his letters (Record, p. 56), and so knowing, he forwarded to him the copy of the answers of 1894, in aid of the use Brown stated he wished to make of them, *i. e.*, in aid of the latter's purpose to publish. It clearly was no error prejudicial to the appellants to allow the jury to pass upon the probability of a fact, which they themselves admitted to be true.

3. The third criticism, if of any materiality in itself, has none in connection with the prayer in question taken as a whole, or with the entire case.

In the first place, while it may be true, as stated by the Court of Appeals, that the instruction is somewhat redundant in its phraseology, there was nothing about it which could mislead the jury. It required them to find that the article falsely and maliciously charged the plaintiff with having testified falsely and contradictorily before a Committee of Congress, from improper motives, "and that such charges were fairly and naturally suggested and inspired by said letter of February 13," as the conditions under which the plaintiff was entitled to a verdict as against any of the defendants.

Both the publication and the letter were before the court, and the genuineness of each was conceded. That the latter did fairly and naturally suggest the charges referred to in the instruction is plainly apparent upon its face, and the court, whose province it is to construe writings, might properly have so instructed the jury, in terms. To submit the question whether it did so or not was clearly not error prejudicial to the defendants.

It is not reversible error to submit a question of law to the jury, where it is clear that they have decided it correctly. Minneapolis Railway *vs.* Rolling Mill, 119 U. S., 149.

In the second place, the ability and effort of counsel have been ineffective to discover any libel in the publication which was not based upon the application in question. The effort is made, and the only portions of the article which have seemed possible to be laid hold of for this purpose are the head lines, "The Acrobatic Performances of Lansden," and the reference to some "St. Louis exploit." The latter was not, and without some *innuendo* or allegation of its intended meaning could not be, claimed to be a libel; while the only action of the court which can by any possibility be held to refer to it is the granting of the defendants' ninth instruction, practically in their own language in so far as this question is concerned, and which instruction necessarily excluded the reference in question, the letter being wholly silent as to St. Louis or any of the appellee's actions or experiences there. That the instructions did not exclude the reference to the St. Louis exploit in terms, if a fault at all, is that of the defendants who framed it.

As to the head lines, the only acrobatic performances attributed to the appellee are the two contradictory statements the letter charged him with making, from improper motives, which statements the letters suggested that the editor "try to reconcile," and which the general manager forwarded to him in furtherance of his expressed purpose to publish them "side by side."

III.

The third and sixth assignments of error are to the action of the court in leaving to the jury to determine, upon the evidence in the case, whether the defendant Bailey, when he gave Leetch the socalled Lansden answers of 1893, knew that the statement as to the cost of the manufacture and of the distribution of gas contained therein were estimates furnished the plaintiff from the books of the company for the purpose of being inserted in the said paper,

and were not figures produced or arrived at by the plaintiff personally.

This assignment of error rests upon the general exception of the appellants to the plaintiff's second prayer for instructions, unaccompanied by any specific objections at the time or in the Record. As gathered from the assignment of error and the brief, the objections to that instruction, apart from those which apply equally to the first, and which have already been considered, are three in number, namely: (1) Absence of evidence that Bailey knew the items in question were derived from the books of the company, and were not the estimates of the plaintiff himself; (2) Absence of proof that Bailey gave the paper in question to Leetch for the purpose of enabling him to communicate them to Brown, and, (3) Absence of proof that he did so to enable Leetch to communicate them to Brown for the purpose of publication.

It is true, as is claimed, that Mr. Bailey denied that he possessed the knowledge referred to, or any of it, but such denial was by no means conclusive of the matter. It was for the jury, upon all the evidence in the case, including the manner and bearing of the witness upon the stand, and, especially of his self-contradictions and corrections upon this subject, to credit or discredit his denial, as they believed the fact to be; and it is the reference of this question of fact to them for determination which is alleged as error.

1. Upon the question whether he possessed the *data* from which to determine the cost of the manufacture of gas, there was a conflict of testimony between the plaintiff and Mr. Bailey; though, on being recalled (at page 43 of the Record), the latter admits that the *data* to which he referred as possessed by the plaintiff consisted merely of monthly reports of the quantities of material used, unaccompanied by any statement of prices or cost, these being shown only in yearly report, with which it is not claimed that the plaintiff had

anything to do; that it was purely a matter of bookkeeping to ascertain from the books what the cost of manufacture was; and (at pages 41–2), that his office, not the plaintiff's, was the only place where the books show the transactions classified for the year, and that it would be an endless task to go over the daily and weekly items, which are what he testified the plaintiff had, and classify them. The plaintiff testified, and was nowhere contradicted, that he never saw the books in the secretary's office, from which it alone, as appears by Mr. Bailey's testimony taken as a whole, it was at all practicable to get the figures set forth in paper of 1893 as the cost of manufacture. Surely, if the question stopped here, it was proper to refer it to the jury to determine whether Mr. Bailey did not know that these figures were not Lansden's.

The matter is placed beyond the field of discussion, however, when we come to the figures as to the cost of distribution. As to these, after specifying a number of items, running up into the neighborhood of $100,000 or more, which the plaintiff, he concedes, had no personal knowledge of or *data* for acquiring, he admits frankly, at page 44, that when he handed Mr. Leetch these answers, written by Mr. Lansden, at the time he had this Brown letter in charge, *he knew* that—

> "the items in those answers, at least in so far as they regarded the cost of distribution, did not rest upon Mr. Lansden's personal knowledge; that they came from their books,"—

and that he, Bailey, had, himself, given many of those items to Mr. Lansden. If there was error at all, it is clear that it was in Mr. Bailey's favor, consisting only in referring to the jury for determination by them a question which he had himself, in terms, determined against himself.

2–3. In the second and third place, with respect to the claim that there was a total absence of evidence upon the questions, other than Mr. Bailey's denial of them, whether

he gave the paper containing the alleged Lansden answers of 1893 to Leetch to enable him to communicate them to Brown, and for the purpose of publication, direct and affirmative evidence in respect to them was not to have been anticipated. To require it would have been to rule that the defendants should not be held liable for the tort, unless they would confess it; and they, plainly, were in no confessing mood. Mr. Leetch, it will be remembered, even went so far as to swear that he did not know at all that Brown intended to publish the information he was giving him, until he saw the published article in the paper, and adhered to that statement until brought face to face with Brown's letter to him of February 14 and 19, declaring, in terms, that he wished that information for the very purpose of publishing it, and that he would do so in his issue of March 1.

There was, however, ample circumstantial evidence in the case to be submitted to the jury upon these questions, and to justify the conclusions in respect to them at which the jury arrived.

Mr. Bailey admits that Brown's letter of February 12, addressed to the Washington Gas Light Company, and enclosed in an envelope addressed to Leetch or its general manager, was shown him by Mr. Leetch. This letter, written on the business letterhead paper of the "*Progressive Age*," "E. C. Brown, publisher," asks information "concerning the object of Mr. Lansden's attack," and, as above stated, promises that the information given "will be considered confidential *as to source of information*," only; thus giving notice, hardly capable of being misunderstood, that the information itself would not be treated as confidential, but was wanted for publication.

Mr. Bailey further admits that it was upon being shown by Mr. Leetch this letter, the sole request in which was for the information and for the purpose indicated, and in connection with that letter, that he brought to his attention the paper in question, produced and exhibited it, and then gave it to him.

He further admits that, although, as above pointed out, he knew at the time that the—

> "items in the answers, at least in so far as they regarded the cost of distribution, did not rest upon Mr. Lansden's personal knowledge,"

but came from the company's books, and had been given Mr. Lansden by Mr. Bailey himself, he, nevertheless, upon being shown Brown's said letter of request for information, said to Leetch:

> "I have a paper in *Mr. Lansden's own handwriting*, where *he* stated that the price of gas was so and so, and the price of distribution was so and so;"

that he stated this to Leetch "on the subject of this letter of Brown's," and that he then gave him the paper. Record, p. 42.

And the only question is, whether, in view of these facts and circumstances, proved by the testimony of Mr. Bailey himself, and reinforced by his appearance upon the stand and his manner of testifying as observed by the jury, it was error to leave to them, upon the whole evidence, the question whether he did not call the answers of 1893 to the attention of Leetch, and give them to him, for the purpose of enabling him to communicate them to Brown as Lansden's own statement in regard to the actual cost of manufacture and distribution, as tending to impeach his sworn testimony before the committee of Congress, and for the purpose of publication.

IV.

The fourth objection, embracing the eighth assignment of error, relates to the admission of evidence as to the financial condition of the Washington Gas Light Company, for the consideration of the jury in case the plaintiff should be held entitled to exemplary damages.

The objection to this evidence set forth in the brief is that it was "illegal evidence," and that there was no ground

for exemplary damages. The answer is, in the first place, that the objection is not true in point of law; and, in the second, that the objection was not made below, and, consequently, cannot be presented here.

It will be observed preliminarily, however, that the entire matter is wholly unimportant, the plaintiff having subsequently waived any claim to exemplary damages, and the court having instructed the jury to award the plaintiff, if their verdict should be in his favor, only "reasonable and fair compensatory damages, and nothing more." If anything more specific than this—as, for example, a specific withdrawal of the testimony in question—had been desired by the defendants, they cannot object to their failure to get it, since such failure was in consequence of their failure to request it.

Bell *vs.* Denson, 56 Ala. 449.
Warren *vs.* Wagner, 75 Ala. 205.
McNitt *vs.* Turner, 16 Wall. 362.

That a corporation may be liable for punitive damages for the wilful and malicious acts of its officers and agents is well established.

Cleghorn *vs.* N. Y. Central RR., 56 N. Y. 44.
Merrills *vs.* Tariff Manf. Co., 10 Conn. 384.
Maynard *vs.* Firemen's Ins. Co., 34 Cal. 48.
Denver RR. Co. *vs.* Harris, 122 U. S., 597.
Jeffersonville RR. Co. *vs.* Rogers, 38 Ind. 126–27.
New Orleans RR. Co. *vs.* Hunt, 36 Miss. 660.
Atlantic & Great Western RR. Co. *vs.* Dunn, 19 Ohio St. 102.
Goddard *vs.* Grand Trunk RR. Co. 57 Maine, 202.

That to forward, or to cause to be forwarded, to a newspaper, with liberty to publish, as plaintiff's own figures, the estimates of cost contained in the paper of 1893, well knowing at the time that they were not his, and for the purpose

of thereby impeaching his sworn testimony of the following year, is as wilful and malicious an act, and as deserving of punitive damages, as any which could well be imagined, may safely be submitted without argument.

But, in the second place, no such objection was made in the court below. The only ground of exception taken there was that the testimony was "immaterial and irrelevant," and that the counsel would concede the defendant company's ability to pay the amount claimed in the declaration. Record, pp. 34–5. These exceptions are clearly insufficient.

An objection to evidence on the ground that it is "irrelevant, incompetent, and immaterial," is too general, and the specification of the real grounds comes too late when made for the first time in the appellate court.

L. E. & W. Rwy. Co. *vs.* Parker, 94 Ind. 91.
McCullough *vs.* Davis, 108 Ind. 292.
Wash. Gas Light Co. *vs.* Poore, 22 W. L. R., 250.
Patrick *vs.* Graham, 132 U. S. 629.
Dist. of Col. *vs.* Woodbury, 136 U. S. 450.

The proposition that an objection not made below will be disregarded on appeal, is too familiar to require or justify the citation of authorities.

V.

The fifth objection, represented by the ninth assignment of error, and resting upon the rejection of the appellant's thirteenth prayer for instructions, at p. 69 of the Record, is to the court's refusal to hold the Leetch letter of February 13 a privileged communication.

This was a question to be determined by the trial judge, upon all the facts and circumstances disclosed by the evidence.

Newell on Defamation, Sl. & Libel, 389.

No evidence was offered tending to show any relation of duty, trust, confidence or obligation of disclosure of any kind between the appellants and the *Progressive Age*. The latter was simply a newspaper devoted especially to gas, water and electric interests, and the defendant company was simply one of its subscribers.

The meaning of the term "privileged communication" is, simply, a communication made upon such occasion as rebuts the presumption of malice, and the description of cases so recognized is such as are founded upon some recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie* relieves it of the implication from which the general rule of law is deduced.

Townshend on Sl. & Libel, 229 and citations.
Newell on Sl. & Lib., 389.

What recognized obligation or motive, legal, moral, or social, could the trial court have found from the evidence to have existed in this case, for transmitting to the editor of the *Age*, as Lansden's own estimates, tending to establish the falsity of his sworn testimony in 1894, figures which the secretary admits he knew at the time were, in large part at least, not the plaintiff's estimates at all, but figures made up from the defendant company's books, which he never saw, and which were furnished to him by the very officer who, knowing the facts at the time, produced and represented them as the plaintiff's own figures?

To constitute a privileged communication, it must appear that the party had a right, or was under some obligation, to give the information, which was believed to be true; the mode and style must not contain intrinsic evidence of malicious intent over and above what is reasonably necessary and proper in conveying the information, and it must be free from attendant and concomitant extrinsic circumstances showing malicious intent.

Hall *vs.* Parsons, 23 Tex., 9.

"Where the circumstances do not show the defamatory matter to have been spoken or written in pursuance of some duty, or for the purpose of endeavoring to enforce a right, the communication is not privileged."

Polk. Starkie on Sl. & Lib., 681, Sec. 679.

Charges of crime in a newspaper against a candidate for Congress which are false are not privileged, though made without malice and in an honest belief that they are true.

Bronson *vs.* Bruce, 59 Mich. 467.

A fortiori, publications in a newspaper against one seeking an appointment or office not conferred through public suffrage, are not privileged.

Hunt *vs.* Bennett, 19 N. Y. 173.

And see, as to the inefficiency of belief as a defense—

Aldrich *vs.* Wilcox, 81 Ill. 77.

Fountain *vs.* West, 23 Iowa, 9.

Sand *vs.* Joervis, 14 Wis. 722.

Dole *vs.* Lyon, 10 Johns, 447, *et passim.*

In White *vs.* Nichols, 3 How. 266, privileged communications are declared to be of four kinds, viz:

1. Where the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests.

2. Anything said or written by a writer in giving the character of a servant who had been in his employment.

3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.

4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to a committee appointed by the House of Commons to hear and examine grievances.

To which of these classes can it be said that the act of the appellants in this cause can be referred?

Even in an action against the publisher of a newspaper, and where the freedom of the press is accordingly involved, statements imputing crime, if not based upon any facts tending to prove the crime, are not privileged.

People *vs.* Detroit Post and Tribune Company, 54 Mich. 462.

Bailey's figures in 1897 did not tend to prove perjury upon the part of Lansden in giving his own differing figures in 1894. It was only by representing that *both* were Lansden's that the imputation could be effected, and the appellant's own testimony, cited above, shows that this was knowingly done.

But, even if the misrepresentation in this regard had been unintentional and through ignorance or mistake, which is not claimed, and if the supposed interest of gas manufacturers generally in refuting Lansden's testimony as to the cost of gas, as claimed at page 14 of the brief, can be held to have rendered communication to them of the contents of the libel a privileged communication, surely causing such communication to be made to the world through the columns of a public newspaper, can not be so regarded.

In Beardsley *vs.* Tappan, 5 Blatch. 497, it is declared that the principle upon which privileged communications rests, which of themselves would otherwise be libelous, imports confidence and secrecy between individuals.

And see Sanderlin *vs.* Bradstreet, 46 N. Y. 188.
Hunt *vs.* Bennett, 19 N. Y. 173.

Finally, and as conclusive of the proposition that publication in a newspaper can never be held a privileged communication, may be cited the opinion of this court in Philadelphia, &c., RR. Co. *vs.* Quigley, 21 How. 202.

VI.

The sixth alleged error, presented by the tenth assignment of error, and which rests upon the exception to the granting of the plaintiff's first prayer, the rejection of the defendant's second and sixteenth, and the modification of their tenth and eleventh prayers, consists in instructions to the effect that, if the jury believed Mr. Leetch was the general manager of the defendant company, and that he wrote and sent the letter of February 13, 1894, in the course of his duties as such general manager, the company was bound by his act; that, if they should find from the evidence that the letter in question was not written by him as such general manager, for and on behalf of the company and in the discharge of his authorized duties as general manager, but personally and for himself only, their verdict must be in its favor; but that the word "authorized," in this connection, did not mean express authority from the board of directors to write the letter, if this particular kind or class of correspondence was within the purview of his general powers of general management.

Apart from the proposition that corporations are liable only for torts perpetrated or directed by their board of directors, which proposition it is considered unnecessary to argue, this objection would seem from the brief on behalf of the appellants to be based upon the claim—first, that the writing of the letter involved the exercise of discretionary power, in a matter exceptional in character; secondly, that the matter to which it related was, not the cost of gas, but the evidence of a witness; thirdly, that the letter was addressed to the company, and there can be no pretense that the board of directors delegated to Leetch authority to answer it; and, fourthly, that his duties were purely subordinate and ministerial, not embracing charge of the Congressional investigation, or authority to determine what answer, if any, to Mr. Brown's letter of inquiry was required by the interests of the company.

1. The first of these propositions presents the theory that, whenever an occasion which may be designated as exceptional in character, and as requiring the exercise of discretion, is presented, the officers of the company may act for it, without liability upon its part for any wrongs inflicted upon third persons or the public. As might have been anticipated, the learned and laborious research exhibited in the appellants' very able brief has failed to discover a single authority in support of this proposition.

The posting of the agent of a rival company as a swindler, the driving away by force and arms of the employés of a rival corporation engaged in maintaining possession of a parallel railroad track, and numerous other similar examples are to be found in the authorities of torts committed by the officers of corporations upon occasions exceptional in character, and requiring the exercise of discretion; but in none of them has the corporation been held exempt from liability upon such grounds.

2. The second of these objections is unfortunate in its juxtaposition to the last preceding assignment of error. There, it is urged that Mr. Leetch's letter was a privileged communication, on the ground that the subject to which it related, namely, the evidence of the plaintiff as to the cost of the production of gas, was a matter of such vital importance, not to the defendant company merely, but to all gas producers, as to constitute Mr. Leetch's letter, on that ground, a privileged communication, which he had the right to make. Here, the objection is that the subject to which it related was, not the cost of gas, but the plaintiff's evidence as to that cost, which was none of Leetch's business, anyway.

As a matter of fact, it appears that the general manager, himself, had appeared before the committee on behalf of the defendant company, and had opposed his testimony to that of the plaintiff (Record, p. 55), and that the report of that committee was still pending at the date of the libel, not having been submitted to the House until March 23,

1894. If, as is no doubt truly stated in the appellants' brief, it was "of vital importance to all gas producers" to ascertain if the plaintiff's testimony before the committee as to the cost of gas "was worthy of belief, or the outcome of prejudice and spite," this was peculiarly true of the defendant company, whose profits were immediately to be affected by the action of Congress, and whose general manager, employed in the effort to refute this testimony before the committee, had especial reason to break its force by establishing, in so far as he could do so, and by such means as he could, the "prejudice and spite" theory.

3. The third of the objections urged in support of the assignment of error now under consideration, namely, that the Brown letter of inquiry was addressed to the company, and "there can be no pretense that the board of directors delegated to Leetch authority to answer it," is, also, apparently unembarressed by any attempt at consistency with the rest of the defense sought to be established. Throughout the trial, as shown by the Record, the effort was made to show that the Brown letter, being enclosed in an envelope addressed to Leetch, though as "Manager Washington Gas Light Company," was a personal letter to Leetch, so regarded by him, and so answered, as an act of courtesy, merely. Record, pp. 51, 54–5.

Mr. Bailey, the secretary, is the only witness on behalf of the appellants whose testimony bears at all upon the question of Mr. Leetch's authority to answer that letter. His testimony (pp. 42–3, 44–5) is to the effect that he was shown the Brown letter the day it was received, and saw that it was addressed to the company; that he did not answer it,—

> "because it came to Mr. Leetch, and he evidently had not gotten through with it when he handed it to the witness;"

that Mr. Leetch was general manager of the company, and took the place of what used to be the engineer; *that every*

letter is not written from the secretary's office; that all letters relating to the engineer's office pretty much are written by the engineer or superintendent, and that this matter as to the cost of gas was regarded as a matter belonging to the engineer's department, etc. This testimony is coupled, also, with the statement that he did not think Mr. Leetch would have been the proper officer to give the information wanted; that the letter, being addressed to the company, would properly have been answered from the secretary's office; that, although he saw it on the day it came in, it was not answered from his office, "because Mr. Leetch answered it himself;" that it was a letter referring to the truth or falsity as to the cost of the production of gas; that *most* of the letters relating to that subject would properly come to the secretary's office; that neither he nor his company did anything about it when they saw the letter had been made the basis of a charge that the plaintiff had testified falsely, nor did they take any measures to correct the article in any way; and that Leetch's right to answer any letter to the company had never been denied him, or officially questioned.

As stated, Mr. Bailey is the only witness who testified at all in support of the present contention, that reply to the Brown letter was not within Mr. Leetch's line of duty or general powers. In view of its contradictoriness, it was especially within the province of the jury, who saw and heard him, to pass upon the question which he, himself, could not, and would not, fairly and distinctly negative. Add to this the fact that the president, the assistant secretary, the general manager, and all the directors except one who was ill, and one who was a non-resident, were called to the stand by the defense, and that no one attempted to deny that the general manager had the authority to answer the letter, and it is difficult to see, not only how the trial court could have avoided submitting the question to the jury, but how the jury could have arrived at any other conclusion in regard to it.

4. The fourth objection, viz., that Mr. Leetch's duties were purely subordinate and ministerial, not embracing charge of the Congressional investigation, or making answer to the Brown letter, does not require separate consideration. If this claim is true, it should have been proven. The character of Mr. Bailey's testimony upon the point, and the fact that no one of the other officers of the company pretended to sustain it, added to the fact that the secretary not only acquiesced in Leetch's action in answering the letter, but, as the jury found, supplied him with the data for doing so, and that his was the only answer made, and the further fact that the company and all its officers acquiesced without objection in his action, and without any attempt to repudiate or correct it after the publication came to their attention, were certainly sufficient for submission to the jury upon the question of his authority. It is submitted that, in absence of opposing evidence, they were conclusive of it.

The general manager, with the active co-operation and aid of the secretary, as the jury has found by its verdict, did answer the letter, and occasion the publication; ten copies of it were sent the company by the editor on the day of its publication; the president admits that he knew of it after it appeared, though he claims he did not read it; while the assistant secretary testifies (p. 48) that he read it, was amused at it, and "thought it funny." The action of the general manager and secretary was never objected to by the company nor by any of its officers; and their want of authority in the premises is neither suggested nor claimed by any one except its attorneys at the trial of the cause.

The jury may infer from circumstances that an act of a corporation's employee is done in the course of his business as its servant; and, if so done, and the act is libelous, the corporation is liable, even though the act is in excess of the agent's authority and wrongful.

Fogg *vs.* Boston & Lowell RR. Co., 148 Mass. 513.

In this case, one Dow, who was in charge of a ticket office of the defendant company, which was arranged for the advertisement and sale of its tickets, posted up on the wall a clipping charging the plaintiff, who was a ticket broker selling rival tickets, with being a ticket swindler. There was no evidence that it was any part of his duty to post any notices pertaining to the business carried on in the office; but, in view of the fact that advertisements were posted there, that Dow was in charge of the office, and that the notice in question tended to diminish the plaintiff's and increase the defendant's income, it was held that it might be inferred that the act was done in the course of his business as a servant of the defendant company, and that the latter would be liable for it, without either actual knowledge or subsequent ratification, and though it was in excess of his authority and wrongful.

In Denver, &c., Railway *vs.* Harris, 122 U. S., 597, the appellant's vice-president and assistant general manager, with a force of its employés, attacked with deadly weapons the employés of a rival road, in the effort to dispossess the latter of a certain railroad, and seriously wounded the appellee. No vote of the board of directors or other authorization to capture the road in question was proved or claimed; *held*, that the fact that the attacking party was under the command of the defendant company's chief or controlling officers, rendered it liable for the tort, to wit, the murderous assault, with firearms, upon the appellee, and that the damages might be punitive.

See, also, Salt Lake City *vs.* Hollister, 118 U. S., 256.

In Lake Shore Railway *vs.* Prentice, 147 U. S., at pp. 113–14, commenting upon Denver Railway *vs.* Harris, *supra*, it is declared that—

> "the appellant company in that case was held liable, not only to compensatory but to punitive damages, upon the single ground that the corporation, by its

governing officers, participated in and directed all that was planned and done."

These governing officers were the vice-president and assistant general manager, as against the general manager and secretary in the case at bar.

"The steady process of judicial evolution has led to the establishment, in some of the courts, of the just doctrine of responsibility of a corporation for the acts of the sentient persons who represent it, and through whom it acts, and of the liability of a corporation for the acts of its agents under the conditions which attach to individuals. Philadelphia R. R. Co. *vs.* Quigley, 21 How., 202; Goodspeed *vs.* East Hadden Bank, 22 Conn., 530; Vance *vs.* Erie RR. Co., 3 Vroom, 334; Copley *vs.* Grover & Baker Sewing Machine Co., 2 Woods, 494; New Orleans RR. Co. *vs.* Bailey, 40 Miss., 395. We approve this doctrine, and hold that a corporation may be held liable for a malicious prosecution conducted by its officers and agents, just as if the corporation were a natural person."

Williams *vs.* Planter's Ins. Co., 57 Miss. 764.

Copley *vs.* Grover & Baker Sewing Machine Co., 2 Woods, 494, is cited and commended in—

Salt Lake City *vs.* Hollister, 118 U. S., at p. 262.

See, also, P. & R. R. R. *vs.* Derby, 14 How. 468, 486.

Bank *vs.* Graham, 100 U. S. 702.

Ins. Co. *vs.* Thomas, 83 Fed. R. 803, 48 U. S. App. 575.

VII.

The final assignment of errors is based upon the fact that the judgment is against the three appellants only, and is silent as to John R. McLean and William B. Orme, who were defendants below.

In the charge to the jury, at p. 73 of the Record, the court said:

"There is no prayer granted or asked by the plaintiff's counsel directed specially to informing you as to whether you may or may not find against the other two defendants, McLean and Orme, and I do not understand that he earnestly insists upon a verdict against them personally. I can only say to you that the evidence tending to show that they are personally liable is slight, and I submit the case to you with that expression, leaving it to your discretion to find for them or against them, as you may think best."

The jury accordingly brought in a sealed verdict, against the other defendants only, and without mentioning McLean or Orme. The verdict was received without objection on the part of any of the defendants; was treated as a verdict in favor of McLean and Orme by the appellants, who gave their appeal bond as the only principals, with McLean and Orme as their only sureties, and whose motion for a new trial was made and argued without mooting the objection now presented, which was raised in the Court of Appeals for the first time. See Rec., p. 79–80.

The only authority cited in support of the objection which is sufficiently pertinent for discussion, is Eng. & Am. Encyc., Title, Verdict, Vol. 28, p. 285; and the authorities there given dispose of the objection adversely to the appellants. The only favorable citation given is Schweinhardt *vs.* St. Louis, 2 Mo. App. 571; in which case it is held that the verdict must be for or against all the defendants, in order that those against whom the verdict is rendered may know whether or not they can look to their codefendants for contribution; from which decision it is to be presumed that contribution between tort-feasors prevails in that State.

In Gulf RR. Co. *vs.* James, 73 Tex. 12, upon a similar state of facts and the like objection, the court declared that the objection was one of form, not of substance; that there was no ambiguity or uncertainty as to the finding against the appellant, and that if the other defendants below had supposed that any doubt existed concerning themselves they could have the verdict corrected at the time.

In Kinkler *vs.* Junica, 84 Tex. 116, where there was a similar verdict, but the court had entered up the judgment against the defendants found guilty and in favor of the others, to which action it was objected that the verdict did not authorize the judgment, the court said:

> "The effect of the verdict was a finding in favor of the remaining defendants, and judgment was properly entered in their favor."

In Lockwood *vs.* Bartlett, 7 N. Y. Sup. 481, the jury disagreed as to one defendant, and found against the others. *Held*, that judgment was properly entered up as against the latter. The plaintiff, said the court, might have proceeded against the latter alone, or he might have dismissed as against the former, in neither of which cases could the latter have complained.

In Ward *vs.* Taylor, 1 Pa. St. 238, upon a verdict similar to that in the case at bar, the court said that the irregularity might be cured by entering a *nol. pros.* as to the omitted defendants, either in the Appellate Court or in the court below, the record being remanded for that purpose.

These are the authorities, and all of them, referred to in 28 Am. & Eng. Encyc., p. 285, which is the authority, and the only authority, pertinent to the question cited in support of the objection.

All the other citations in support of the tenth assignment of error will be found, upon examination, to be without bearing upon the present case. They are either cases in which the verdict finds facts which are not in issue, and omits to find those which are, as in Patterson *vs.* United States, 2 Wheat. 221; State *vs.* Carleton, 1 Gill. 250; or where the verdict is *non assumpsit*, where the action was in tort, as in Garland *vs.* Davis, 4 How. 147; or where a special verdict failed to find some fact which was essential to the plaintiff's right to recover at all, as in Hodges *vs.* Easton, 106 U. S. 408, etc.

On the other hand, where the verdict is defective in not finding all the facts essential to a judgment, but is free from

objection as to those which it does find, the authorities are believed to be harmonious to the effect that the *venire de novo*, if awarded, should be extended only to the issues not determined by the verdict, leaving those which are found by it to stand undisturbed.

Hughes *vs.* Hughes, 15 M. & W. 701.
Fletcher *vs.* Marshall, Id. 765.
Baxter *vs.* Nurse, 6 M. & G. 942.
Lambert *vs.* Fogg, 49 N. H. 310.
Lisbon *vs.* Lyman, 49 N. H. 582.
Wood *vs.* Wood, 52 N. H. 422.
Dexter *vs.* Codman, 148 Mass. 421.

In other words, if it were necessary to award a trial *de novo* in this case because of the omission to find specifically as to the defendants McLean and Orme, the issues thereunder, according to the authorities, should properly be restricted to the guilt or innocence of those defendants, and the findings thereunder, whatever they were, would in no way alter the judgment as to the appellants, who, accordingly, can have nothing of which to complain. As above pointed out, however, in the case at bar, the omission to find against the defendants, McLean and Orme, under the practically unanimous current of authority, is to be treated as a verdict in their favor; or, if not so, it is a mere irregularity, to be cured by *non pros.* as to them, either here or in the court below; and is, moreover, an irregularity of which, inasmuch as it does not injuriously affect or concern them, and especially as it was not excepted or objected to by them in the trial court, the appellants have no right to complain.

Finally, upon this point, the objection is not properly presented on this appeal. It should have been raised, in the trial court, by a motion in arrest of judgment. Hatton *vs.* McClish, 6 Md. 407, 418. It was not raised there, in *any* manner, and is not before this court, for any purpose. Ib.

It is respectfully submitted that the judgment should be affirmed.

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